

No. 3691

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

NORTHPORT SMELTING & REFINING COMPANY  
(a corporation),

*Appellant,*

VS.

LONE PINE-SURPRISE CONSOLIDATED MINES  
COMPANY (a corporation),

*Appellee.*

} IN EQUITY

On Appeal From the United States District Court for the Eastern  
District of Washington, Northern Division.

BRIEF FOR APPELLEE.

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FILED  
OCT 17 1911  
U. S. DISTRICT COURT  
SPOKANE, WASH.



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## BRIEF FOR APPELLEE.

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### Statement of the Case.

This is a suit to quiet title to an underground segment of vein based upon an alleged extra-lateral right asserted by virtue of the ownership of the Lone Pine lode mining claim owned by appellant. The appellee is the owner of the adjoining Last Chance lode mining claim, vertically beneath the surface of which is found the segment of vein in controversy. The plat here inserted will illustrate

the relation between these claims and the position of the vein in controversy.

This map is a composite of defendant's (appellant's) Exhibits Nos. 26 and 27. The position of the apex of the Lone Pine No. 2 vein, which is the vein here in controversy, is shown on this plat colored in red, as is also the position of the apex of the discovery vein of the Lone Pine claim. It will be noted that these veins extend across the Lone Pine claim in a northeasterly and southwesterly direction, whereas the Black Tail vein apex, colored in orange, and also the Surprise vein apex, which is substantially parallel to the Black Tail, extend northwesterly and southeasterly.

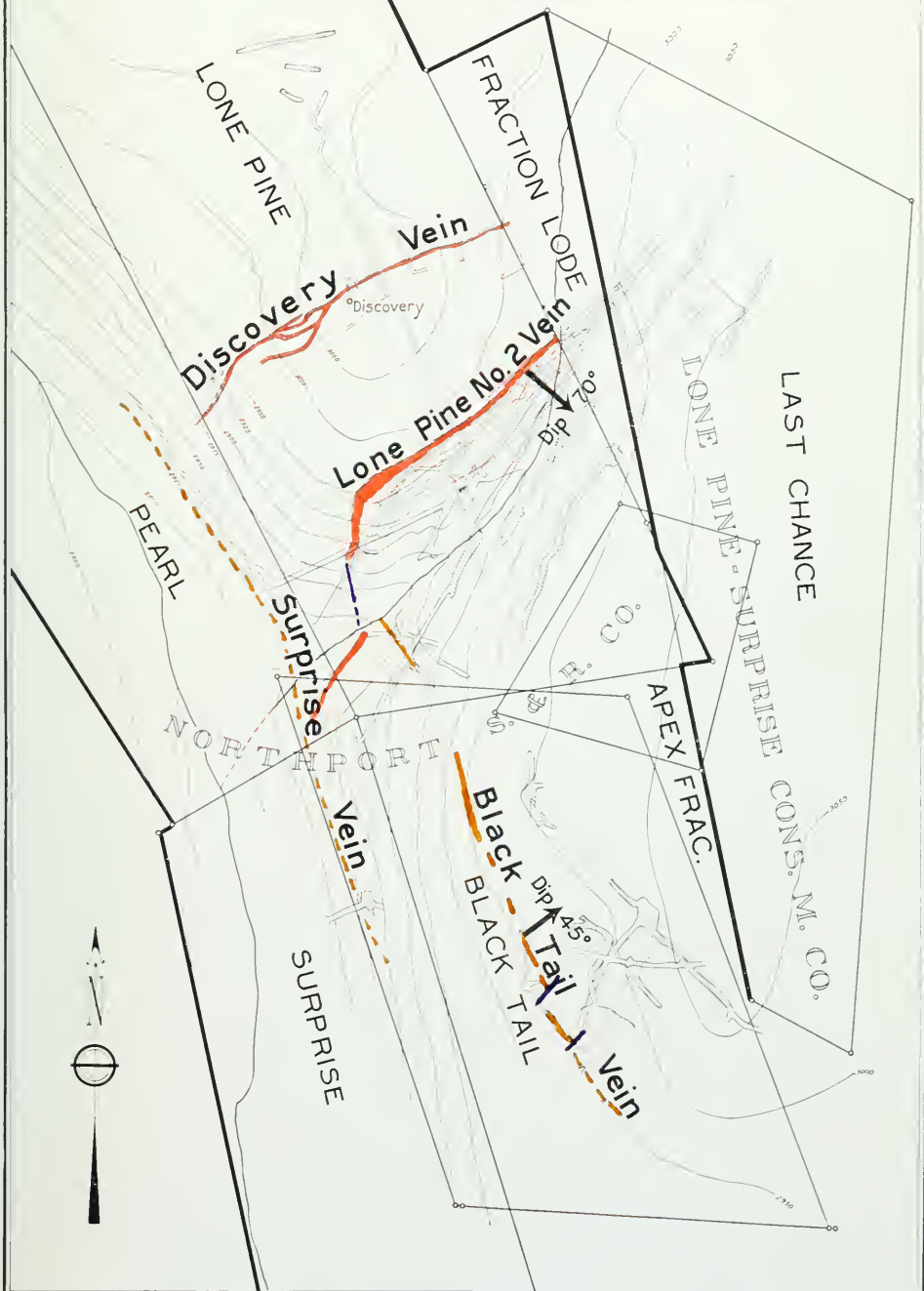
The apparent curvature of the apex of the main segment of the Lone Pine No. 2 vein at its westerly end is attributable, as the court will observe, to the normal migration of the intersection of this apex with the steep hill slope as evidenced by the contours. In other words, the apex on its onward course has been sliced off and exposed along the steeply descending hillside and the general strike of the vein has not been materially affected by this situation (R. pp. 132-135, 471).

The various workings on the Lone Pine No. 2 vein beneath the surface of the Lone Pine and Last Chance claims are indicated by the shaded areas extending downward in the direction of the dip of the Lone Pine No. 2 vein. A comparison of the exhibits introduced by both sides will indicate that

# COMPOSITE

FROM  
SURFACE AND UNDERGROUND MAPS  
( Exhibits Nos 26 and 27 )

Scale of Feet  
0 100 200 300 400 500





there was no very great difference in the presentation and interpretation of these facts, except where we approach critical points. In view of the fact that the main issues here involved are questions of law, and the physical features, outside of those in controversy, are comparatively unimportant, a further statement of the physical facts will be reserved until their discussion under appropriate headings.

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### **The Issues.**

Appellee rests its defense in this case upon three propositions, any one of which is sufficient to defeat the claims of appellant.

1. The main issue is one of law, and is, in our opinion, determinative of this case. It was admitted by appellant that the apex of the discovery vein existing at the discovery point on the Lone Pine claim could be followed practically without interruption across both opposite side lines of the Lone Pine claim, and extending substantially at right angles to these side lines. The position of the apex of this discovery vein, which was disclosed by practically continuous trenching across the Lone Pine claim, is indicated on the plat inserted hereinbefore. The Lone Pine No. 2 vein was claimed by appellant to have been known to exist at the time of the location of the Lone Pine claim or shortly thereafter, and at least prior to issuance of patent. According to its contention this vein turns practically at right angles and becomes what is commonly

known in that district as the Black Tail vein, passing out through the southerly end line of the Lone Pine claim. According to the contention of opposing counsel this vein is found entering the easterly side line of the Lone Pine claim, and turning sharply at right angles becomes the Black Tail vein, passing out through the southerly end line of the Lone Pine claim, changing not only its strike practically at right angles to its former course, but also dipping at right angles to the Lone Pine No. 2 vein. The relation of the two veins is illustrated on the plat hereinbefore inserted. Appellant also claims that this Lone Pine No. 2 vein, being known to exist, at least prior to the issuance of patent, is what opposing counsel assert is a primary vein as far as the Lone Pine claim is concerned. That being one of the primary veins, as is also the discovery vein, appellant has the privilege of selecting for extralateral right purposes which of these two primary veins will best serve its purposes.

It is the contention of appellee on the other hand that the position of the apex of the discovery vein with reference to the surface boundaries of the Lone Pine claim absolutely controls the direction of the extralateral right or rights which may be asserted by virtue of the ownership of that claim, and since the apex of this discovery vein crosses both side lines practically at right angles, dipping in the direction of the southerly end line of the claim, that the side lines become end lines for extralateral right purposes on all veins which are found to apex

within this claim. That, as a corollary, in following this No. 2 Lone Pine vein, appellant is limited by the easterly side line of the Lone Pine claim extended downward vertically, since it has become for extralateral purposes an end line, or, as the courts have termed it in descriptive phraseology, a "side-end line".

2. We will point out in an appropriate portion of this discussion hereinafter, the fact that the Lone Pine No. 2 vein was known to extend crosswise of the Lone Pine claim practically ever since its existence first became known, and that to call it the Black Tail vein and claim that it is an extension of the Black Tail vein, turning practically at right angles to the normal course of the Black Tail vein, was an afterthought devised and planned for the purposes of this litigation. As a matter of fact the Lone Pine No. 2 vein does not turn at right angles and cross the southerly end line of the Lone Pine claim, but is faulted for a short distance and continues on in the same southwesterly direction across the Lone Pine claim, its apex crossing the westerly side line of the claim a few feet northerly from the southwest corner of the Lone Pine claim. This faulted segment appears on the plat inserted hereinbefore. The Black Tail vein is an entirely distinct vein belonging to another series, extending on in a northwesterly direction for an indefinite distance within the Lone Pine claim. Therefore, even assuming that opposing counsel's erroneous assumption that there can be more than

one discovery or primary vein within a mining claim, were actually the law, this Lone Pine No. 2 vein, which they contend to be a primary vein, also crosses both opposite side lines of the Lone Pine claim. In view of our conviction that the law as announced by the learned trial court is eminently correct, we are of the opinion that this second issue is unimportant, and we only discuss this feature of the case because it has been urged so strongly by opposing counsel.

3. As a third defense (and one which we also consider unimportant by reason of the strength of the first defense above noted) we contend that to allow appellant an extralateral right on the Lone Pine No. 2 vein, as claimed by it, would result in granting the right to follow not only this Lone Pine No. 2 vein as it crosses the easterly side line of the Lone Pine claim, but also each of the other veins found within the Lone Pine claim, viz., the No. 1 vein, the discovery vein, and the No. 4 vein, more on their strike or onward course than on their dip or downward course.

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## I.

### THE DISCOVERY VEIN OF THE LONE PINE CLAIM ADMITTEDLY CROSSES BOTH OPPOSITE SIDE LINES OF THE LONE PINE CLAIM.

On this point the trial court said:

“It was conceded at the trial, or at all events there was no controversy over the fact, that the strike of the discovery vein of the Lone Pine claim is substantially parallel to the end

lines of the claim, and that the discovery vein passed out through and beyond both side lines.”

(R. p. 35.)

Northport S. & R. Co. v. Lone Pine Surprise  
C. M. Co., 271 Fed. 105, 109.

Opposing counsel in brief of appellant, page 5, state that

“the appellant does not dispute that at the point where the notice of location was posted there is a branching quartz vein which does cross the opposite side lines of the claim.”

That this was the original discovery vein will be found from an examination of the following testimony: Creasor, R. pp. 423, 426-7; Ryan, p. 524; Robbins, p. 396; these witnesses being the three locators of the Lone Pine claim.

The bill of complaint alleged the discovery of a vein or lode, and that the locators “posted a notice upon said claim at the point of discovery” (R. pp. 3-4). The fact of the making of said discovery on said vein is further alleged in appellee’s complaint in paragraphs VII to X inclusive (R. pp. 4-6). The answer admits these allegations of the complaint (R. p. 19).

The location notice contains the following statement:

“This notice is placed at discovery post.”

(R. p. 675.)

When the Lone Pine claim was surveyed for patent the original locator, Creasor, pointed out to the deputy mineral surveyor the cut exposing the vein

in the vicinity of the location notice as the discovery point (R. pp. 170-2). The official field notes embraced in the patent record (Exhibit 11) contain five references to the "discovery cut" and the "discovery", giving its position (R. pp. 576, 594, 654, 666, 683).

The plat of the official survey (Exhibit 12) shows the position of the "discovery" (R. p. 684).

The patent calls for the "discovery cut" of the Lone Pine claim, identifying it by course and distance as the cut above referred to, and in which the discovery vein is disclosed (R. p. 692).

Opposing counsel have endeavored to minimize the importance of this discovery vein. The assays from this vein ran from \$1.00 to \$7.00 taken in the immediate vicinity of the discovery cut at regular intervals on each side (Exhibit 33, R. pp. 406-7, 714).

There were sixteen inches in width of solid quartz exposed in the discovery cut and the vein widened out to five feet in width of quartz only a few feet away.

Wiley, R. p. 466; Burch, p. 306; Lakes, p. 350;  
Robbins, p. 404; Clarke, p. 457.

**Sec. 2320 of the mining statute contemplates the existence of but one discovery vein upon which a lode location shall be based.**

In the determination of rights granted by the mining statute, the language of the statute itself is controlling.

Section 2320 of the Revised Statutes provides that

“\* \* \* no location of a mining claim shall be made until *the discovery of the vein or lode* within the limits of the claim located. No claim shall extend more than 300 feet on each side of the middle of *the vein* at the surface.  
\* \* \* ”

Words could not be plainer than that but *one* vein was intended as a discovery vein, and that the 300 feet in width of the surface area was to be measured out on each side of “*the vein* at the surface. \* \* \* ”

Sec. 2322 of the Revised Statutes grants to the locator, in addition to his discovery vein, “all veins, lodes and ledges, etc.,” found to apex within the surface lines of the claim. This was a departure from and addition to the grant under the former act of 1866, which only gave the locator the one original discovery vein apexing within his surface lines. As was said by the Supreme Court of the United States in commenting on this statute:

“\* \* \* so that a location gives to the locator something more than the right to *the vein which is the occasion of the location*. \* \* \* ”

Campbell v. Ellet, 167 U. S. 116, 120.

The case of Del Monte M. Co. v. Last Chance M. Co., 171 U. S. 55, 88, also interprets the statute in the same manner.

“We pass, therefore, to an examination of the provisions of the statute. Premising that the discoverer of *a vein* makes the location, that he is entitled to make a location not exceeding 1500 feet in length, along the course of *such*

*vein* and not exceeding 'three hundred feet on each side of the middle of the vein at the surface' \* \* \* that it will be assumed that he will take all of the length of *the vein* that he can, we find from Section 2322 that he is entitled to all veins, lodes and ledges throughout their entire depth the top or apex of which lies inside of 'such surface lines extended downward vertically'."

A little later the court again said, in commenting on an appeal from a decision of this court (9 C. C. A.):

"What limits this right to a secondary vein extralaterally? The statute says vertical planes drawn downward through the end lines of the location. What end lines? *Those of and determined by the original location and lode*, the Circuit Court of Appeals decided. Those determined by the direction of the newly discovered lodes, regardless of whether they were originally intended as end lines or side lines, the appellant, as we have seen, contends. The court of appeals was right."

Walrath v. Champion Mining Co., 171 U. S. 293, 306.

"But rights on the strike and on the dip of *the original vein*, and rights on the strike and on the dip of the other veins, we have decided are determined by the end lines of the location."

Id., p. 311.

The same court again said:

"A locator, therefore, is not confined to *the vein upon which he based his location and upon which the discovery was made.*"

Calhoun Gold M. Co. v. Ajax Gold M. Co., 182 U. S. 499, 508.

The General Land Office very early (1880) interpreted this statute in the only way that it can be logically interpreted:

“The law contemplates that he shall make his location on *one vein*, and while certain rights attach to other veins whose top or apex is found within his surface boundaries, yet *but one vein can be made the basis of his location.*”

In re Helvetia Lode, Copp’s Mineral Lands,  
p. 279;

United States Mining Statutes Annotated,  
J. W. Thompson, Vol. I, p. 54.

That there can be but one discovery lode is the unanimous opinion of all the text writers who have expressed an opinion on the subject.

“One thing seems quite certain—the law, as at present construed, may compel the inquiry, where two veins are found to exist within a claim, as to *which one was discovered first*—that is, *which vein was the basis of the location*—and there exists to this extent a distinction between the two classes of veins.”

Lindley, 3rd Ed., Vol. II, p. 1399 (Sec. 594).

Commenting on this statement of Judge Lindley’s, Mr. Henry Arnold, in a masterly analysis of certain extralateral cases, states:

“In other words, where two veins are found to apex within the surface territory of one location, no distinction is to be drawn between them, but both are to be treated as of equal dignity—unless a question arises as to some point concerning, or dependent on, the drawing or character of the boundaries of the location, in which event, but in which event only, an inquiry

as to *which is the discovery vein* (that is, as to *which vein served as the basis of location*), becomes of moment.”

22 Harvard Law Review, pages 278, 279.

“118k. Extralateral rights on secondary (incidental) veins—that is, on veins other than the discovery (original or principal) vein—are determined with reference to those lines, which for the discovery (original or principal) vein’s extra lateral rights are the end lines of the claim.”

Costigan on Mining Law, page 440.

“There can be but one set of end lines for all the veins covered by the patent; and where departure from one or both side lines renders it material, *only the discovery vein* can be used to determine what are the planes of the end lines.”

Morrison’s Mining Rights, 15th Ed., page 215.

That the one discovery vein and only the discovery vein is all-important in determining the extralateral rights of the claim is further emphasized in the following cases:

Silver King Coalition Mines Co. v. Conkling  
M. Co., 41 Sup. Ct. Rep. 426;

Montana M. Co. v. St. Louis M. & M. Co.,  
204 U. S. 204, 206;

Stewart Mining Co. v. Ontario Mining Co.  
(Idaho), 132 Pac. 787, 793;

Ajax Gold Mining Co. v. Hilkey (Colo.), 72  
Pac. 447, 449;

Anaconda Co. v. Pilot Butte Co. (Mont.), 156  
Pac. 409.

“It is now settled law that the legal end lines of *the original or discovery vein* are the end lines of all veins within the surface boundaries with respect to extralateral rights.”

Jefferson M. Co. v. Anchoria-Leland M. &  
M. Co. (Colo.), 75 Pac. 1070, 1073.

“The course of *the primary or discovery vein* definitely determines the end lines and side lines for *all* veins having their apexes within the exterior boundaries of the location.”

U. S. Mining Statutes, Annotated by J. W.  
Thompson, Part I, page 149.

The foregoing authorities will abundantly establish the fact that the courts only contemplate that there shall be but one primary or discovery or original vein upon which the location is based. This is necessarily so from the very nature of the case, for if a locator could base his claim upon more than one vein, there would be no consistency in the Federal Mining Statute (Section 2320 U. S. Revised Statutes), which plainly and unequivocally provides that a location shall not exceed 1500 feet “in length along *the vein or lode*”, and which further provides for

“the discovery of *the vein or lode* within the limits of the claim located. No claim shall extend more than three hundred feet on each side of the middle of *the vein* at the surface.

\* \* \* ”

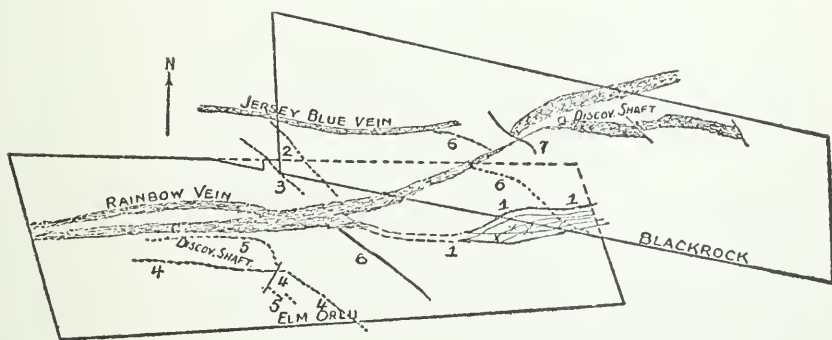
The statute does not say "discovery of veins or lodes", as counsel urge, but expressly limits the discovery to "*the vein or lode*". What vein? As all the authorities hold, the one discovery vein. This basic and controlling statute necessarily and in so many words contemplates the discovery of but *one vein or lode*, which shall be used as the basis for laying out the lines of the location. If the statute had contemplated that more than one vein or lode could form the basis of the location, the statute would not have specifically limited the discovery to the one vein or lode. It would be a manifest physical and practical impossibility and an absurdity to attempt to lay out the lines of an ideal mining location as contemplated by the statute, both in length along the lode and also "on each side of the middle of the vein at the surface", if more than one vein or lode could be used as the basis for the location.

**Clark-Montana Co. v. Butte & Superior Co.**

This case, reported in 233 Fed. 547, constitutes the main reliance of opposing counsel on this appeal. There has been inserted in brief of appellant, at page 12, a purported reproduction of the diagram accompanying the opinion found on page 552 of the 233 Federal. This reproduction in appellant's brief is in the main accurate with one very vital exception. A segment of the branch of the Rainbow vein within the Black Rock claim appears on appellant's diagram to cross the north side line of the Black

Rock claim. This is the extreme right hand segment of vein showing on the plat found in appellant's brief at page 12. An examination of the diagram contained in 233 Fed., at page 552, discloses no such crossing of the side line of the Black Rock claim by this branch of the Rainbow vein.

For convenient reference and comparison we reproduce at this point an exact copy of the sketch or diagram found in 233 Fed.



An examination of Judge Borquin's opinion will disclose that he expressly states that he does not know where the extension of this branch of the Rainbow vein is to be found. In speaking of the Rainbow vein he says that it "branches in the Black Rock, one strand crossing the Black Rock north side line, and one coursing easterly a disputed distance" (p. 552). And again, on page 571 of the report he says:

"The Rainbow strand easterly from the Black Rock discovery shaft extends about 400 feet east and to within 250 feet of the Black Rock east end line, where it is cut off by a northwest fault."

He finds against the contention of the defendant that this easterly strand crosses the Black Rock east end line, but says:

“It is probable that the eastern segment of the easterly strand was faulted to the north and may appear in a trench north of the Black Rock north side line. \* \* \* Considering the evidence in connection with the patent presumption, it does not persuade that the easterly strand crosses the east end line.” (p. 572.)

It is quite clear from these excerpts and the remainder of the opinion bearing on this question, that Judge Borquin not only distinctly found that the evidence did not demonstrate that this easterly strand crosses the easterly end line of the claim, but he also was in doubt as to where this further extension might be found, but with the probability in favor of its being faulted northerly of the Black Rock north side line.

It is true that Judge Borquin in his opinion used language which would lead to the conclusion that he considered both the Rainbow and Jersey Blue primary veins, in spite of the fact that the discovery shaft exists upon the easterly strand of the Rainbow. He says:

“Neither the Jersey Blue nor the Rainbow is a secondary vein. Both are primary. The Jersey Blue overlaps the Rainbow. \* \* \* That the Rainbow crosses both side lines is not controlling. There can be but one set of end lines, and if the located end lines fixed extra-lateral rights upon one vein, *as they do upon the Jersey Blue*, they fix them upon all veins.” (page 571.)

It is quite apparent that this language is inconsistent, in view of the fact that the court states at the outset that both the veins are primary, and then concludes his discussion by stating that he has selected the Jersey Blue as determining the end lines, and that all other veins are consequently governed by those end lines. In other words, he has virtually stated that he has found the Jersey Blue to be the primary vein, and that it follows as a natural corollary that the end lines controlling extralateral rights on the Jersey Blue would control all other veins, which necessarily and logically would become secondary veins, including the Rainbow.

It is to be observed that Judge Borquin concludes that the fact "that the Rainbow crosses both side lines is not controlling". If Judge Borquin found the Rainbow to be a discovery vein, and also if the Rainbow vein crossed both side lines, then his holding would be diametrically opposed to the ruling of the Supreme Court of the United States in the case of *King v. Amy & Silversmith Cons. M. Co.*, 152 U. S. 222, and also to the more recent case of *Silver King Coalition Mines Co. v. Conkling Mining Co.*, 41 Supreme Court Reporter 426, 427, also decided by the same court in April of this year.

Judge Borquin's conclusion on this point can only be reconciled with this express ruling by the highest court in the land, on either one of two theories:

1st: That he fixed "extralateral rights upon one vein", namely, the Jersey Blue, and that consequently that fixed them upon "all veins" (233 Fed. 571). This rule, however, would be equivalent to holding that the Jersey Blue was the discovery vein, which is utterly inconsistent with the fact that the discovery shaft of the Black Rock claim was placed upon the easterly branch of the Rainbow vein and that the Black Rock location notice and patent referred to this as the discovery point.

2nd: A more logical way to uphold Judge Borquin's decision would be to consider the easterly branch of the Rainbow vein upon which the discovery shaft is situated, as the discovery vein upon which the Black Rock claim was predicated. As Judge Borquin found, this vein extended substantially parallel with the side lines of the claim for several hundred feet in an easterly direction from the discovery shaft, where it was cut off by a fault about 250 feet from the easterly end line. The further extension of this easterly branch or strand of the Rainbow vein was not found by the court to exist within the Black Rock claim.

(As we have noted, opposing counsel's plat, opp. p. 50 of appellant's brief, purporting to be a copy of the illustration found in 233 Fed. 552, is erroneous insofar as it shows a segment of the easterly strand of the Rainbow vein crossing the north side line of the Black Rock.)

The court stated the probability was that it had been faulted so that its onward extension was found

northerly of the north side line of the Black Rock claim. In other words, it had been faulted outside of the surface boundaries of that claim. It is well recognized law that where a vein has a considerable extent within a claim in a longitudinal direction, substantially parallel with the side lines of the claim, and has then been faulted so that its further extension within the claim is not found, extralateral rights will be awarded in the direction of the end line planes up to a plane passed through the point of faulting or termination of such vein within the claim.

Carson City M. Co. v. North Star M. Co., 73 Fed. 597, 602-3;

Same case affirmed by this court (9th C. C. A.), 93 Fed. 658, 669;

Del Monte M. Co. v. Last Chance M. Co., 171 U. S. 55, 90-91;

Del Monte Co. v. New York M. Co., 66 Fed. 212, 215;

Wall v. U. S. M. Co., 232 Fed. 613, 615;

Tyler M. Co. v. Sweeney, 54 Fed. 284, 292;

Lindley on Mines (3rd Ed.), pages 1363-1364;

Costigan on Mining Law, pages 427-429.

Judge Borquin's decision was so overwhelmingly in favor of the plaintiff in that case that evidently plaintiff was satisfied to abide by his ruling and did not see fit to appeal on this point. The defendant, in whose favor the ruling would operate, naturally did not raise the question on appeal, and it was not presented for determination either before this court

in 248 Fed. 609, nor in the Supreme Court of the United States in 249 U. S. 11.

If Judge Borquin's decision on this point cannot be based upon the grounds suggested, then his holding is diametrically opposed to the unmistakable language of the mining statute, which, as already pointed out, contemplates the discovery of but *one* vein or lode which shall furnish the basis of the location, and the measuring of the exterior boundaries therefrom. It is also opposed to the express ruling of the Supreme Court of the United States, and all of the other courts that have spoken upon the question, namely, that a discovery vein which crosses both opposite side lines of the location changes the direction of the extralateral rights of that location so that the side lines become end lines for all purposes, including the measuring of rights on all other veins found within the limits of that location and which are necessarily secondary veins.

As the learned trial judge said in deciding the case at bar by way of comment on Judge Borquin's decision:

“The decision itself is out of harmony with the language of the courts in the many extralateral right cases decided during the last half century. In all of these cases it seems to have been taken for granted, if not decided, that the principal effect of the act of 1872 was to extend the grant, so as to include all veins or lodes having their top or apex within the surface boundaries, but with the same end lines, the same side lines, and the same extralateral rights as properly appertain to the discovery vein,

which forms the basis of the location and patent."

(271 Fed. 105, 112.)

**The side lines of a mining location become end lines in contemplation of the law where the discovery vein crosses both opposite side lines.**

It has long since become well settled law that where the apex of the discovery vein crosses both opposite side lines of the claim that these side lines become what the courts have termed "side-end lines", and for extralateral purposes the original side lines extended vertically downward limit the rights extralaterally, and beyond these planes the locator cannot go. This limitation is applicable to all veins found to apex within the claim. Opposing counsel apparently concede that this is the law, with the exception that they contend that there can be more than one primary vein, for they state in appellant's brief at page 9:

"If the vein at the point where the location notice was posted is the only original or discovery vein of the Lone Pine claim, the side lines of that claim become end lines and the appellant cannot succeed."

It is therefore unnecessary to discuss this proposition extensively, and we merely cite the leading case of *King v. Amy & Silversmith Cons. M. Co.*, 152 U. S. 222, where the court says at page 228:

"In the Amy claim, the lines marked as side lines cross the course of the strike of the vein and do not run parallel with it. They, therefore, constitute end lines."

Justice Miller, while on the Supreme bench of the United States, charged a jury in the case of *Stevens v. Williams*, 1 McCrary, 480, 490, as follows:

“The plaintiff is not bound to lay his side lines perfectly parallel with the course or strike of the lode, so as to cover it exactly. *His location may be made one way or the other, and it may so run that he crosses it the other way.* In such event his end lines become his side lines, and he can only pursue it to his side lines, vertically extended, as though they were his end lines. \* \* \*

And the Supreme Court of the United States has again announced this same rule on April 11th of this year in the case of *Silver King Coalition Mines Co. v. Conkling Mining Co.*, 41 Sup. Ct. Rep., 426, 427.

**The side lines become end lines not only of the discovery vein but of all other veins apexing within the limits of the claim.**

This doctrine has been laid down in the cases already cited and in the cases noted by the Supreme Court of the United States in the *Silver King Coalition-Conkling* case (41 Sup. Ct. Rep. 427). Justice Field, speaking for the Supreme Court of the United States in the case of *Iron Silver Mining Co. v. Elgin Mining Co.*, 118 U. S. 196, 207, stated that the same end line planes were to control in the case of *all* veins found to apex within a mining claim.

This court has held,

“\* \* \* that, end lines having been once established, they become end lines for all veins found within the surface boundaries.”

St. Louis M. & M. Co. v. Montana M. Co. (9th C. C. A.), 104 Fed. 664.

The case of Cosmopolitan Mining Co. v. Foote, 101 Fed. 518, was a case possessing many points of similarity to the case at bar. In that case the discovery vein of the Badger location crossed the claim practically at right angles to the side lines and parallel to the end lines, just as does the discovery vein of the Lone Pine claim. A secondary vein also existed within the limits of the Badger location, the apex of which extended practically at right angles to the discovery vein and parallel to the side lines. The owner of the Badger claim contended that he was entitled to follow this secondary vein as it dipped extralaterally beyond his side line and beneath the surface of an adjoining location, the Cosmopolitan. The court held, however, that since the discovery vein ran crosswise of the Badger location, that therefore the located side lines became end lines and, as such, determined the extralateral right planes *for all lodes*. As a result the owner of the Badger claim could not exercise any extralateral right on the secondary vein beyond the vertical side boundary of the Badger claim. A diagram illustrating this case will be found at page 1397 of Vol. 2 of the third edition of Lindley on Mines, where this case is discussed.

Therefore, unless all of the law which has heretofore been announced by the Supreme Court of the United States and the other courts which have spoken on the subject, as well as the text writers, is to be overturned and even though appellant in this case were successful in its contention that the large Lone Pine No. 2 vein swung around almost at right angles and passed out of the southerly boundary of the claim as a weak and comparatively inconsequential Black Tail vein, this fact would be of no avail in the light of the positive language of the statute and all these decisions.

**In any event, the Lone Pine No. 2 vein was not known to exist at the time the location was made.**

We have pointed out the fact that the whole sequence of events from the date of the original location down to and including the issuance of patent establishes conclusively that the vein disclosed at the point of the posting of the notice on the Lone Pine claim was the discovery vein. Every act of the locators at a time when there was no possible incentive to obscure the true situation, is consistent with the fact of this discovery of the vein crossing the claim through the discovery cut.

Creasor, the man who had more to do with the making of the Lone Pine location than anyone else, testified that he came upon the ground which he located as the Lone Pine from the north, along the top of the ridge within what is now that claim, until he reached what he considered was quartz in place

(R. pp. 422-3, 426). This he positively identified as the discovery vein, and at this place he cut off a small pine tree and upon the portion which he left standing he wrote his notice of location (R. p. 423). The outcrop of the discovery vein was only 8½ feet north of this discovery post. It is in the exact center of the claim, being equidistant from the end lines and from the side lines as well. He testified positively that he had not seen the Welty boys on the ground up to that time (R. p. 427), and that at that time he did not "know there was such a thing as the Black Tail Claim" (R. p. 434). Mr. Creasor testified positively that he did not know of the existence of the No. 2 Lone Pine vein until the 6th of March (R. p. 429), or approximately a week after the Lone Pine claim had been located. On the 6th of March, after having returned from his long trip out to record the location notice, Mr. Creasor carefully went over the Lone Pine ground and first noted the No. 2 Lone Pine vein (id.).

Mr. Ryan, the only other one of the three locators, who was actually on the ground at the time of location, testified that the first quartz was found up at the Lone Pine tree (R. p. 522), and it was only later, when he had located the Last Chance claim (which took place on the following day) that he knew anything about the outcrop of the No. 2 vein. He testified that the Lone Pine "*was already located at that time*" (R. p. 523).

We have this positive testimony of both of the original locators of the Lone Pine claim who actu-

ally participated in the acts of location, that the quartz of the discovery vein had been discovered at the point where the location notice was posted, and the claim had been located before either of them knew of the existence of the Lone Pine No. 2 vein, which, though it had a bold outcrop, was so stained and covered with lichen and surface discoloration, that it was not distinguishable from the ordinary country rock except upon close inspection (R. p. 444).

To attempt to overcome this positive testimony of the locators of the Lone Pine claim, plaintiff called as a witness John Welty, who testified that he pointed out to Creasor and Ryan from his Black Tail discovery on the Black Tail claim, the croppings of the Lone Pine No. 2 vein (R. p. 208). In view of the fact that the croppings of the Lone Pine No. 2 vein are not visible from this discovery point, and in view of the fact that both Ryan and Creasor testified that they did not know of the Black Tail vein until after making their location, this testimony is obviously incorrect. When pressed on cross examination Welty weakened and stated that it was hard to remember things so many years ago (R. p. 209), and he could not recall dates because "it is too far gone" (R. p. 211). On cross examination he admitted he was not positive that Creasor was on the Black Tail before he located the Lone Pine (R. p. 211). One fact in this connection is worth noting, and that is that Welty testified that he could see the Lone Pine No. 2 vein outcropping on the Lone

Pine claim for probably "100 feet at least that cropped out prominently" (R. p. 212). An examination of the plat and the position of the croppings of this Lone Pine No. 2 vein as it existed at that time, and being that portion that opposing counsel are pleased to designate as the extension of their Black Tail vein, necessarily had a course nearly across the Lone Pine claim in a northeasterly and southwesterly direction, and practically at right angles to the strike of the Black Tail outcrop. How anyone could consider an outcrop of this character, crossing the Lone Pine claim nearly at right angles, an extension of the Black Tail vein, places a considerable strain upon the logic and consistency of the far-fetched argument advanced by opposing counsel that the Lone Pine claim was located as an extension of the Black Tail claim.

It is also worthy of comment to note that if Welty knew of this alleged extension of the Black Tail claim into Lone Pine ground that he did not cover it with his Black Tail claim, which was a prior claim in point of time, and yet which is only 900 feet in length, as appears from the District Map of Claims in this vicinity introduced in evidence (Exhibit No. 13).

In passing it might be well to call attention to the human probabilities of the situation here involved. If the "great" Lone Pine No. 2 vein outcrop had been discovered and recognized as such by the locators of the Lone Pine claim at the time the location was made, does it not stand to reason that the loca-

tors would have placed their discovery notice on this large vein rather than at the discovery point where it was actually posted in close proximity to the much smaller discovery vein?

Mr. Ralston, after testifying very positively as to his conception of the existence of the Black Tail vein within Lone Pine ground, and its relation to the Lone Pine No. 2, and the fact that he had the opinion at the time he made the patent survey that there was a vein running longitudinally through the Lone Pine claim substantially corresponding with the lode line that he surveyed, had to admit on cross examination that in March of 1899 he had prepared a plat (Defendant's Exhibit No. 14, R. p. 703) which showed the only veins then known within the Lone Pine claim and which were, according to his conception, cross veins, one of which, as portrayed on his plat, corresponds very closely to the position of the outcrop of the Lone Pine No. 2 (R. p. 190). He also prepared a report in 1900 describing these cross veins and no mention whatever was made of any north and south veins. (R. pp. 191, 198, 201, also Exhibit 15, pp. 708-9.) He also testified that the No. 1 Tunnel which he described in his report accompanying the official survey, was in 150 feet extending a short distance north of the open stope on the No. 2 vein (R. p. 177). It is manifest from all the maps and models that this tunnel cross-cut the vein practically at right angles, so that at the time he made his patent survey he knew as positively as did everybody else who saw or examined the prop-

erty that this No. 2 vein ran across the claim nearly at right angles to its length, as did the discovery vein, the Lone Pine No. 1 vein, and the Lone Pine No. 4 vein, as well as numerous other smaller veins. At the time of the location, at the time of the patent survey, and up to the date of the issuance of the patent, which was March 2nd, 1899 (R. p. 699), there was no evidence that there was any known vein whatsoever within the Lone Pine claim, running northerly and southerly, as claimed by opposing counsel in their brief (see appellant's brief, pp. 34-37).

Mr. Robbins, the third locator of the Lone Pine claim, and who was manager and in charge of the development of the property for a great many years after its location, examined the veins exposed in this claim carefully in 1896 (not in 1897, as erroneously stated in appellant's brief at p. 35), when he first visited the property in September following the location, and determined that they were east and west veins, and though he looked for a north and south vein he did not find one. He also testified that the first evidence of any north and south vein existing within the Lone Pine claim was not exposed until the year 1900, which, it will be noted, was the year following the issuance of the patent (R. pp. 403, 404). On cross examination he stated positively that when he examined the claim in 1896 he saw nothing but east and west veins. "I was under the impression that we had a north and south vein

from the way the claim was located, *but we did not find it*" (R. p. 411).

The trial court also concluded from the testimony:

"Furthermore, there was no known vein extending lengthwise of the Lone Pine claim at the time of location, or even at the time of patent. There was nothing on the surface to indicate that the Black Tail vein extended that far to the north. \* \* \*"

R. p. 44.

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## II.

### THE LONE PINE No. 2 VEIN DOES NOT TURN ALMOST AT RIGHT ANGLES AND PASS OUT OF THE LONE PINE SOUTHERLY END LINE.

The mining statute which controls these rights in question is so positive in its language that only one discovery vein or lode can exist within the contemplation of its terms, and all the authorities that have spoken upon the subject, including the Supreme Court of the United States, with the one exception of Judge Borquin's Montana Realty-Butte & Superior decision, are so unanimous in their interpretation of this statute, that it would seem superfluous and a waste of the valuable time of this court to discuss the other problem which has been so elaborately considered in the brief of appellant, namely, that if the Lone Pine No. 2 vein can also be considered as a discovery or primary vein, and if it can be demonstrated to turn almost at right angles and be proven to become the Black Tail vein, and to cross

the southerly end line of the Lone Pine claim, that appellant can elect which of these primary veins it will select for extralateral right purposes. They have taken the position that they can ignore entirely the existence of the discovery vein crossing the Lone Pine claim almost at right angles, and adopt their alleged Black Tail vein as a primary vein, which shall determine the direction of the extralateral rights, and upset what had been supposed for twenty years to be the rights attaching to the Lone Pine claim, and follow this alleged Black Tail-Lone Pine No. 2 vein more along its strike than its dip underneath the surface of the Last Chance claim belonging to its neighbor, and take away practically all of the valuable ore bodies from the Last Chance mine. We leave the consideration of the problems just discussed with the utmost confidence that this court will uphold the decision of the learned trial judge, to the effect that it is absolutely unnecessary to enter into any discussion of what becomes of the Lone Pine No. 2 vein in view of the fact that it is a secondary vein as far as the Lone Pine claim is concerned. However, in view of the importance which opposing counsel have placed upon this feature of the case, we cannot in justice to our client ignore the issue raised by appellant in its brief, and we will proceed to point out to this court that even assuming that this strained conception of the law governing this case urged by opposing counsel be correct, nevertheless plaintiff below did not meet the burden of proof placed upon a party asserting

extralateral rights, and did not establish the crossing of the southerly end line of the Lone Pine claim by the apex of the Lone Pine No. 2 vein.

**The Lone Pine No. 2 vein not only crosses the easterly side line of the Lone Pine claim, but it passes out through the westerly side line as well.**

It should be kept in mind that according to the testimony of appellant's witnesses they were working on their theory of the case for a year prior to bringing this suit, and also pursued these developments for a year thereafter before the trial of the case. During this period of two years which preceded the trial they were unable to establish the fact that the Lone Pine No. 2 vein turned practically at right angles and crossed into the Black Tail claim through the southerly end line of the Lone Pine claim. An examination of the models and maps will indicate that the Lone Pine No. 2 vein had during a period of many years been mined down to a depth of 600 feet on five different levels; that the only ore bodies mined along these levels had the general trend of the No. 2 vein crossing the Lone Pine claim easterly and westerly (Record pp. 109, 79, 105, 164, 247); that all of these ore bodies terminated fairly sharply and suddenly in a westerly direction, and if the vein had continued on around a bend nearly at right angles to its former strike and become the Black Tail vein, occupying a more northerly and southerly course, it should have been in this long period of time a comparatively easy matter for

plaintiff below to have developed this turn on some one or the other of these various levels and absolutely demonstrated its theory. A careful examination of the testimony of plaintiff's witnesses will indicate that while some of them tried to point out various minor features occurring on these levels which would indicate a turning, and though some of them admitted that it would only take a few feet of development work, which could have been done in a few days, to have disclosed this alleged turning of the vein on these levels (R. pp. 114, 123-124, 247-8), there was no real evidence of any turning, and the work which could easily have been done in a few days, according to their own admissions, for some unaccountable reason was not prosecuted. Some work was done on these levels but abandoned, evidently because the results did not satisfy appellant. It is only on the Lone Pine No. 2 tunnel level that there was any real attempt made to establish their theory. An examination of plaintiff's Exhibit 4, which has been reproduced opposite page 50 of appellant's brief, but with a very important omission, will indicate how weak and unconvincing are the facts which they have attempted to expose within this two-year period of development. An examination of the original exhibit will indicate that appellant has omitted from its reproduction of this exhibit in this brief, the segment of vein found to exist and outcrop at the surface, and crossing the westerly side line of the Lone Pine claim just a few feet north of the southwest corner of that claim.

The position of this segment of vein is indicated on the illustrative plat inserted in this brief at the outset, and from its position on the ground and the intervention of the fault, which accounts for the sudden westerly termination of the stopes of the main Lone Pine No. 2 vein, it is quite evident that this segment of vein crossing the westerly side line of the Lone Pine claim is the faulted extension of the main Lone Pine No. 2 vein.

An examination of the original plaintiff's Exhibit No. 4, which is a map of appellant's own making, and which shows the Lone Pine No. 2 vein at the point of its nearest approach to this side line segment, will demonstrate the almost identical correspondence in strike between these two segments. This faulted segment of the Lone Pine vein was only put on this exhibit after considerable urging by counsel for appellee (R. pp. 129-131), and is again omitted from appellant's reproduction of this exhibit in its brief. This side line vein segment was admitted by appellant's own witnesses to be a "strong appearing vein," varying from 3 to 6 feet in width in places (R. pp. 70-71, 128, 232, 357, 405, 455, 477), and the assay introduced in evidence by appellee established that this side line segment carried values of over \$20.00 (see Defendant's Exhibit No. 32, R. p. 713, and Lake's testimony, p. 358). This corresponds in value to the values recovered from the main segment in Lone Pine No. 2 workings, where the ore averaged \$17.00 (R. p. 451).

On the other hand, if the court cared to take the time and it were essential to a determination of this case, which we firmly maintain is not the fact, we could point out that in a country where so many quartz veins occur as are found in this region, and as will appear from an examination of the maps and models, it is not at all strange to find quartz occurrences along the line of the alleged extension of the Black Tail vein, as it would cross into Lone Pine ground. Appellant's witnesses said there were "hundreds" and thousands of such exposures (R. pp. 229, 249). We could point out the admissions of appellant's own witnesses to the effect that there were intervals where they had tried to develop the Black Tail vein and no quartz was exposed (R. pp. 93, 94), and that in the critical workings, to-wit, the end line tunnel and the end line surface cut, these same witnesses admitted that the showing of the Black Tail vein at those points was "unusually weak" (R. p. 95), and that the alleged exposure of the vein at the end line trench was a very poor exposure (R. p. 119); that it was a "weak showing for the Black Tail vein" (R. p. 122).

We would also be able to point out that in projecting the probable extension of the Black Tail vein as found in Black Tail ground at its most northerly exposure, and attempting to correlate it with the vein exposures found in Lone Pine ground, that appellant's witnesses have arbitrarily swung the position of this vein across the intervening unexplored distance in the opposite direction from that

which it would normally occupy if we take into account the natural normal migration of the apex of the Black Tail vein down the slope. This fact was admitted by appellant's witnesses (R. pp. 116, 117, 279). We could also point out the fact that there is a vein of considerable prominence existing in a little winze to the north and back of the footwall of the Lone Pine No. 2 vein near Station 64C, as shown on Defendant's Exhibit No. 28; that this vein was directly in line of strike with another vein exposure in the Pearl tunnel, also shown on the same exhibit near point 322, and which would occupy approximately the position which the Black Tail extension would occupy normally if it extended into Lone Pine ground (R. pp. 359, 478, 249, 228, 229, 314, 283, 249). These vein exposures were absolutely ignored by appellant and appellee introduced the miner who sunk the winze near 64C, and who stated that the ore ran fifteen or eighteen dollars per ton, and that the width of the vein that they were breaking at that point was thirty inches; that it dipped to the east following down the winze and that its strike was practically at right angles to the No. 2 vein and tunnel (R. pp. 461, 462).

It is a more normal and convincing explanation of the facts to consider this faulted segment of vein crossing the Lone Pine westerly side line as the faulted extension of the main Lone Pine No. 2 vein with which it conforms in strike and values. It is just where we would expect to find such an extension. On the other hand, it is too much of a wrench

to our idea of reasonable probabilities to accept the theory that this vein of great size and carrying considerable values suddenly turns southerly almost at right angles and becomes the weak and miserable showing claimed to be the Black Tail vein crossing the south end line of the Lone Pine claim. Two years to develop this turning, which their own witnesses stated ought to be easily done in a few days, and yet the disconnected fragments and "poor showing," which their own witnesses admit is all that is exposed, is the best they can offer to sustain the heavy burden of proof the law imposes on one who seeks to invade his neighbor's territory!!

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### III.

**TO AWARD APPELLANT THE RIGHT CLAIMED BY IT WOULD RESULT IN ALLOWING THE DEFENDANT TO FOLLOW NOT ONLY THE LONE PINE No. 2 VEIN, BUT PRACTICALLY ALL OTHER VEINS EXISTING WITHIN THE CLAIM MORE ON THEIR STRIKE THAN ON THEIR DIP.**

Appellant attempts to establish the fact that in following the Lone Pine No. 2 vein into the Last Chance claim and mining on that vein, it would be following more nearly along the dip of the vein than on its strike, and in its attempt to establish this assertion calls attention to Plaintiff's Map, Exhibit 3, and the testimony of Mr. Searls, asserting that "this testimony stands undisputed" (pages 66-68, brief of appellant). An examination of that plat and of Mr. Searls' testimony will indicate that

the strike which he has taken for the Lone Pine No. 2 vein is the hypotenuse of practically a right triangle formed by the two legs, one of which represents the Lone Pine No. 2 vein, extending easterly and westerly in Lone Pine ground, and the other represents the alleged Black Tail vein, extending northerly and southerly in Lone Pine ground, and which counsel contends is a part of the Lone Pine No. 2 vein. It will be noted in this connection that no ore has ever been taken or found within the Lone Pine claim along this alleged Black Tail leg of the triangle, as admitted by appellant's own witnesses (Record, pp. 164, 105, 247, 79, 109). All of the ore has been mined from the great Lone Pine No. 2 vein, extending at almost right angles across the side line of the Lone Pine claim, and Mr. Searls himself admitted on cross examination, when asked to give an average strike for 300 feet within the Lone Pine claim as you approach the side line, "The general strike at the side line is about north 44 degrees [east]," and in answer to the trial court's query as to whether it was about the same on both sides, he replied: "Yes, sir. It is shown by this working—these workings. There is no great diversion" (R. pp. 143-144).

The patent record shows that the direction of the end lines of the Lone Pine claim is north  $81^{\circ} 23'$  east (R. p. 692). It will thus be seen that the angle formed between these two is about  $37^{\circ}$  or considerably less than a right angle, so that according to appellant's own evidence this fact is established. If

we examine the strike of the discovery vein as disclosed by the various maps and exhibits, as well as the other veins which are cross-cut by the main tunnel of the Lone Pine claim, we find that practically all of these veins will cross the side line of the Lone Pine claim more on their strike than on their dip, some of them, particularly the discovery vein, crossing nearly at right angles, so that to award appellant an extralateral right in the direction of the Last Chance claim would be contrary to the spirit of the statute, which expressly provides that veins shall be followed extralaterally on their "downward course" and not on their onward course. On this point see the case of *Stewart Mining Co. v. Ontario Mining Co.*, 237 U. S. 350. Also see the same case below (Idaho), 132 Pac. 787, 792. *Stewart Mining Co. v. Bourne*, 218 Fed. 327, the latter case having been decided by this court.

Counsel cite certain Federal cases found in 131 Fed. (pages 68-69 of appellant's brief), in support of their contention that the angle at which the end lines are laid across the lode does not affect the right to follow the vein extralaterally. It is rather interesting to note that one of the distinguished counsel for plaintiff at one time urged before the various courts, and particularly before the Supreme Court of the United States, that these authorities which he now cites in the "Brief of Appellant" were not controlling on this point, since it was not essential to the decision in those cases referred to that the court should have expressed an opinion on the question.

And he further points out in that same brief that if those cases are analyzed, it will be found the extralateral rights there asserted, including that of the San Carlos, were not attempted to be exercised more along the strike than the dip.

We do not feel that it will be essential for this court to pass upon this point, but simply point out what would occur if appellant's contentions should prevail.

#### **Erroneous statements in brief of appellant.**

During the course of the preceding argument we have replied to the principal matters discussed in appellant's brief. There are, however, certain specific statements contained in the brief which we cannot permit to pass unchallenged.

On page 28 counsel criticise Mr. Creasor's testimony as to his conception of the direction of the discovery and other parallel veins. Opposing counsel say that "his testimony is unbelievable and is clearly false". They argue that no one could have known at that time that these various veins ran crosswise instead of lengthwise of the claim. It is quite evident from the maps and the reading of the testimony as a whole that these veins, one after the other, do actually outcrop, crossing the claim instead of extending lengthwise through it.

Counsel on page 29 urge that the difficulty which they allege plaintiff experienced in tracing of the apex of the discovery vein across the side lines indi-

cates this fact. Their criticism is most unfair. In the early stages of the case it was deemed sufficient to merely trench the discovery vein crosswise at intervals, and these exposures were considered satisfactory until immediately prior to the trial, one of the principal witnesses for appellee insisted that a complete exposure of the apex of the discovery vein should be made from side line to side line. Plaintiff experienced no greater difficulty than is encountered in a great majority of cases in tracing vein exposures, in "stripping" or exposing the apex of this vein until it was established to have practical physical continuity, extending from one side to the other of the Lone Pine claim.

We cannot refrain from commenting on the language used by counsel on page 34, to the effect that a certain statement made by the trial court in its opinion that the Lone Pine No. 2 vein so far as then known extended crosswise of the Lone Pine claim "is not supported by a single scintilla of evidence". This is rather a sweeping charge to make, especially in view of the eminent ability and learning of the District Judge criticized.

We have already in this brief pointed out the fact that Mr. Robbins, who was one of the locators and who for years was familiar with every detail of the early development of the claim being manager and in control of operations of the Lone Pine, testified that there was no exposure of a north and south vein anywhere within the Lone Pine claim until after the patent had issued. The patent issued

March 2nd, 1899, and it was not until 1900 that the north and south vein exposure south of the gully near the southerly end line of the Lone Pine claim was uncovered in some excavation work that was being done there at that time (R. pp. 403-404, 412). We have also called attention to the fact that at the time of the patent survey the No. 1 tunnel was in 150 feet and had crosscut the Lone Pine No. 2 <sup>new</sup> claim, disclosing beyond question that it extended at right angles to the direction of that tunnel, and therefore at right angles to the side lines, which are substantially parallel to the course of the tunnel.

We have also called attention to the fact that the croppings of the Lone Pine No. 2 claim were exposed along the surface for some 100 feet or more in an easterly and westerly direction. We have also pointed out the fact that in 1899 Mr. Ralston, one of appellant's own witnesses, prepared a map of the Lone Pine claim, and every vein portrayed on that map is a cross vein, there being no intimation or suggestion that any north or south vein was known at that time. A consideration of this testimony makes counsel's unjust charge all the more remarkable for the evidence overwhelmingly supports the trial court's statement.

Counsel again permit themselves to fall into the same error, for on page 36 of their brief they say of another statement of the trial court in its opinion, to the effect that the locators knew that the discovery vein on the Lone Pine crossed the side lines, that "this statement is unsupported by any evi-

dence". It is so apparent that counsel's assertion is erroneous that it is hardly necessary to discuss the matter.

An examination of the testimony of the witnesses who described the discovery vein will indicate that it outcropped conspicuously. On this point Mr. Creasor testified, referring to the time of discovery on Lone Pine:

"Q. Did you at that time actually know which way the vein ran?

A. Yes, sir; certainly; they showed as plain as anything could be, every one of them at the top of the hill."

(R. p. 427.)

If it were worth taking up the time of the court, we could point out additional evidence to corroborate this, but what we have stated is sufficient to show that counsel's sweeping assertion is unjustified. That this statement of opposing counsel is not inadvertent is evident from the fact that they reiterate the criticism on the following page of their brief in practically the same language.

We must confess that we are profoundly surprised by their reference on page 39 to the trial judge "as a judge unfamiliar with the mining law". In view of the fact that one of the writers of this brief has participated in the trial of mining cases involving extralateral rights which Judge Rudkin has decided and which decisions have been reviewed by this court on appeal, and affirmed, we cannot help but feel that this unjustified criticism is prompted in a measure

by the adverse decision of the trial court. We are all prone to entertain the opinion that those who differ from us do so because of ignorance, but counsel are certainly not justified in this criticism in the instant case.

Again, on page 45 counsel refer to the fact that the president of the plaintiff company testified that he drove the 300 and 400 levels out as crosscuts and failed to find any vein in these workings. As a matter of fact, the 300 level was not driven by Mr. Day or under his direction, but Mr. Wiley testified to the exposure of a pronounced vein not over a foot in thickness which he observed in the No. 3 level cross-cut, which lines up exactly where you would expect to find the downward extension of the vein in the winze on the No. 2 level where the north and south vein is exposed (R. p. 501). Mr. Lakes also testified to this same exposure (R. p. 367).

#### **Moral equities.**

There is always an atmosphere surrounding a case, which, while perhaps it may not be determinative of the problems involved, adds additional weight to the conclusions of the trial court. The trial court by reason of its opportunity to personally observe the witnesses and everything that is done and said in the trial court, occupies a position of advantage in this respect. In the case at bar the parties had assumed for over twenty years following the location of the Lone Pine and Last Chance claims that the Lone Pine claim had no extralateral rights be-

neath the Last Chance. It was only a year prior to the trial of the case that Mr. Ralston, one of appellant's witnesses, had suddenly changed his mind and decided that instead of being a cross vein within the Lone Pine claim, that the main Lone Pine No. 2 vein turned at right angles and passed out through the southerly side lines (R. p. 203).

The president of the appellant company, also had this same idea until just prior to the filing of suit, when he had developed what in his estimation gave him a cause of action against the Last Chance owner (R. p. 159). In other words, it took nearly a quarter of a century to develop this case. As the trial court said in its opinion, after giving the reasons for the decision:

"I reach this conclusion with the less hesitation because it leaves both parties in the full possession and enjoyment of all rights claimed by them and their predecessors in interest for more than twenty years after the location of their respective claims."

(R. pp. 46-7.)

It should also be borne in mind that this action was brought by appellant after it had attempted to lease appellee's mine in order to obtain the ore in controversy for smelting purposes, and had failed to effect the lease or get appellee to ship to appellant's smelter (R. p. 416).

These factors are not determinative of the issues here involved, but, as the Supreme Court of the United States has said under somewhat similar cir-

cumstances, they furnish "a strong argument" in support of an otherwise just determination."

**Burden of proof.**

It is, of course, unnecessary for us to do more than call to this court's attention the heavy burden which rests upon appellant in this case where it is seeking to invade its neighbor's sub-surface. The courts are so unanimous in their conclusion that the extralateral claimant, under such circumstances, has the "laboring oar" throughout and that upon him rests the heavy burden of establishing his contentions by "clear and satisfactory evidence", that citation of authority is unnecessary. In this case appellant is also met by the additional presumption where a great vein, twenty or more feet in width, in many places carrying practically continuous ore bodies, crosses the side line of the Lone Pine claim, and extends for several hundred feet within the Lone Pine claim, aimed directly at the opposite side line, that in the absence of convincing evidence to the contrary it is presumed to cross this other side line.

"Where a vein crosses a side line and extends across rather than along a claim for any considerable distance, the inference to be drawn is that it intersects the other side line rather than an end line."

Bourne v. Federal Mining & Smelting Co.,  
243 Fed. 466, 469.

It will be observed that in the case at bar the presumption that a vein extends lengthwise of the claim

has been overcome, at least as far as this vein is concerned, by the fact that it admittedly crosses the side line and continues on within the claim, crossing it for several hundred feet in the same direction to the point where the stopes are terminated by a faulting.

We have commented on the fact that to overcome this, appellant has taken a number of comparatively small scattered exposures of quartz extending at right angles to the course of this great vein, and has endeavored to carry these exposures by connecting them up at intervals across the southerly end line of the Lone Pine claim. This has been done in the face of the fact that appellant's own witnesses had testified to the fact that there were "hundreds" and even "thousands" of quartz veins having this general direction within the territory in controversy (R. pp. 229, 249).

No wonder that this testimony was not convincing, for while the trial judge felt that it was unnecessary for him to decide the physical problem as to whether this vein did occupy the position alleged by plaintiff, yet, in commenting on this testimony, he expressed grave doubt as to this theory. In commenting on this right angle turning and the alleged crossing of the south end line, he said, "if indeed that fact can be said to be established at this time" (R. p. 44; 271 Fed. 112). At the end of the opinion he refers again to these "debatable questions", indicating that his own mind was not convinced on this point (R. p. 46; 271 Fed. 113).

Appellant certainly has not met the burden of proof contemplated by law. As was said by the Supreme Court of Idaho:

*“Where the evidence is doubtful and uncertain, the court ought to decline its aid to one who is invoking its decree in order to enable him to pass beyond his own side lines and remove ore bodies from beneath the location of another.”*

Stewart M. Co. v. Ontario M. Co., 132 Pac. 787, 794.

To recapitulate, the contention of opposing counsel that there can be more than one discovery vein within the Lone Pine claim, is in conflict with the allegations of their original bill of complaint. It is absolutely inconsistent with the location notice, the patent plat and field notes, and the patent itself. It is contrary to the letter and spirit of the fundamental statute upon which their rights are based. There can be but one discovery vein in the Lone Pine claim, and that vein admittedly crosses both side lines. This in itself is sufficient to destroy the possibility of any assertion of rights such as plaintiff claims. Appellant seeks to acquire rights which, if granted, would inevitably mean that it could follow more on the strike than on the dip of virtually all of the veins existing in the Lone Pine claim which lie parallel to each other, striking across its easterly side line. This asserted right is in direct violation of the statute, which grants the right to follow veins on their “downward course”, and not on their “onward course”.

We also respectfully urge that appellant has failed to sustain the burden of proof involved in its theory that the Lone Pine No. 2 vein turns at right angles and becomes the weak and insignificant Black Tail vein alleged to exist in the southern portion of the Lone Pine claim. Inevitably under both aspects of the case the decree of the District Court was correct.

Dated, San Francisco,

October 17, 1921.

Respectfully submitted,

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